

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
OBED ARTHUR KALWITZ, JR. and)	CASE NO. 99-34758 HCD
ROLENE MAE KALWITZ,)	CHAPTER 12
)	
DEBTORS.)	

Appearances:

R. William Jonas, Jr., Esq., attorney for debtors, Hammerschmidt, Amaral & Jonas, 137 North Michigan Street, South Bend, Indiana 46601; and

Joseph D. Bradley, Esq., attorney for the Estates of Helen & Obed Kalwitz, Sr., 105 East Jefferson Boulevard, Suite 512, South Bend, Indiana 46601.

ORDER

At South Bend, Indiana, on March 21, 2003.

Before the court is the “B.R. 3008 Motion for Reconsideration of Order Allowing and Disallowing Claims” filed by the debtors Obed Arthur Kalwitz, Jr. and Rolene Mae Kalwitz on October 10, 2002. It asks that the court reconsider its Judgment and Memorandum of Decision issued September 30, 2002 (“court’s order”). On November 27, 2002, the court heard the positions of the parties concerning reconsideration of the court’s order. It then took the motion under advisement.

Discussion

Bankruptcy Rule 3008 states that “[a] party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate.” Substantive post-judgment motions that are filed “no later than 10 days after entry of the judgment” are treated as Rule 59 motions. See *Abraham v. Aguilar (In re Aguilar)*, 861 F.2d 873, 874 (5th Cir. 1989) (*per curiam*); *Pride Cos., L.P., v. Johnson (In re Pride Cos., L.P.)*, 285 B.R.

366, 369 (Bankr. N.D. Tex. 2002). In this case, the debtors' Motion for Reconsideration was filed on the tenth day after entry of the court's order. Therefore Rule 59, made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 9023, guides the court's consideration of the matters raised by the debtors. A Rule 59(e) motion to alter or amend a judgment is discretionary; "the only grounds for a Rule 59(e) motion . . . are newly discovered evidence, an intervening change in the controlling law, and manifest error of law." *Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998). The court has reviewed the debtors' designations of error in the court's order. It now addresses each point in turn.

The debtors first contended that the court's order allowing claim 8 was erroneous because it granted the claimant a one-third interest in the Weich Farm rather than a one-sixth interest. The court finds this point well founded. Claim 8, filed by the Decedents' Estates ("claimants"), claimed a one-third interest in the Weich Farm. Nevertheless, both the claimants and the debtors acknowledged in their briefs that the Decedents' Estates hold a one-sixth, not a one-third, interest in the Weich Farm. The court correctly recognized the one-sixth interest of the Decedents' Estates in its Memorandum of Decision. *See* R. 195 at 8-9. Even though both parties and the court agreed that the Decedents' Estates' interest, in claim 8, was a one-sixth interest, the court's Judgment and Conclusion to the Memorandum of Decision simply stated that "the court allows claim 8." R. 196, 195 at 27. The court's order, in its Judgment and Memorandum of Decision, therefore is now amended to state expressly that the court allows claim 8 in the amount of one-sixth of the interest in the Weich Farm.

The debtors next asserted that the court, in allowing claims 8, 9, and 10, erroneously concluded that it did not need to address the debtors' argument about the right of contribution from partners or co-tenants. The debtors pointed to *Baker v. Chambers*, 398 N.E.2d 1350 (Ind. Ct. App. 1980), which expressed the "well-established rule . . . that when two or more persons take as tenants in common under an instrument which is silent in regard to their respective shares, there is a presumption that their shares are equal." *Id.* at 1351. The state

appellate court stated that the presumption was rebuttable and that evidence of contribution could be shown to refute it.

The court finds no error in its determination that it did not need to address the right of contribution of the parties. The instrument at issue, the Weich land contract, was not silent with respect to the designation of shares: It specified that the three Kalwitz sons, as tenants in common, received an undivided one-third interest in the farm. The court found that the language of the instrument was clear and unambiguous, and it gave effect to the intent of the parties as expressed in the four corners of the document. *See Dick Corp. v. Geiger*, 783 N.E.2d 368, 374 (Ind. Ct. App. 2003). Once the court determined that the 1976 contract was valid and that each of the Kalwitz sons legally owned an undivided one-third interest in the Weich Farm, there was no presumption that could be rebutted by an equitable consideration of the amounts each Kalwitz son contributed to the farm.

The debtors' third contention was that the court, in allowing claim 8, erroneously concluded that it did not need to address the debtors' argument that the claim was barred by the doctrine of judicial estoppel. Eugene Kalwitz and Sharon Greiger, in this bankruptcy proceeding, appear as the personal representatives of the estates of Obed Arthur Kalwitz, Sr. and Helen Kalwitz, designated as the "Decedents' Estates." They brought claim 8 in their roles as the personal representatives, claiming that the Decedents' Estates held an interest in the Weich farm pursuant to the written 1976 land contract. In the past, however, they brought claims in state court as the heirs of their brother Theodore Kalwitz. The debtors asserted that Eugene Kalwitz and Sharon Greiger "took a contrary position in the [state court] Deed Reformation Action to the position asserted in this [bankruptcy] court under Claim 8." R. 185 at 18.

Judicial estoppel "prevents a party from assuming a position in a legal proceeding inconsistent with one previously asserted." *Brightman v. State of Indiana*, 758 N.E.2d 41, 48 (Ind. 2001); *see also Clark v. Crowe*, 778 N.E.2d 835, 841 (Ind. Ct. App. 2002). In this case, Eugene Kalwitz and Sharon Greiger, as the brother and sister of Theodore, brought claims in state court as heirs of their brother Theodore's estate. Now

they appear as personal representatives of the Decedents' Estates in this bankruptcy court. The court finds that their roles in each proceeding are separate and distinct but not inconsistent. *See Metropolitan Dev. Comm'n v. Schroeder*, 727 N.E.2d 742, 751 (Ind. Ct. App. 2000) (concluding that two enforcement actions against the defendant were based on different zoning ordinance violations and thus that judicial estoppel did not apply). The debtors have not shown that Eugene Kalwitz and Sharon Greiger have taken contrary positions or have repudiated positions that they formerly had claimed to be true. *See, e.g., Bethesda Lutheran Homes & Servs, Inc. v. Born*, 238 F.3d 853, 857-58 (7th Cir. 2001) (explaining that, after plaintiffs won judgment on ground that certain Medicaid regulations were unconstitutional, they could not seek another judgment on the ground that the regulations were constitutional); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 454-55 (7th Cir. 1998) (finding that the Menominee claims in earlier cases were not necessarily inconsistent with the position taken in the present case), *cert. denied*, 526 U.S. 1066 (1999); *KeyBank Nat'l Ass'n v. Michael*, 737 N.E.2d 834, 847 (Ind. Ct. App. 2000). The role of this court was to determine whether claim 8, brought by the Decedents' Estates, was valid. The personal representatives brought the claim in that capacity, not in their individual capacities. The court found the claim valid and allowed it. The facts in this case do not support a finding of judicial estoppel.

The debtors' final argument is that the court, in allowing claim 10 for all remaining inventory, machinery and equipment, erroneously found that the debtors did not satisfy their burden of producing sufficient evidence to defeat the claim.

In determining whether the equipment was the property of the family farm operation or of Obed Jr., the court followed Federal Rule of Bankruptcy Procedure 3001(f), which set forth that the filing of a claim "shall constitute prima facie evidence of the validity and amount of the claim." Although the rule does not address the burden of proof when a claim is disputed, "one who asserts a claim is entitled to the burden of proof that normally comes with it." *Raleigh v. Illinois Dep't. of Revenue*, 530 U.S. 15, 21-22, 120 S. Ct. 1951, 1955-56, 147

L.Ed.2d 13 (2000). The debtors, as the objectors to the claim, had the burden of producing evidence to defeat the prima facie nature of the claim. See *In re Schwegmann Giant Supermarkets P'ship*, 264 B.R. 823, 827, 829-30 (Bankr. E.D. La. 2001); *In re Revelle*, 256 B.R. 905, 910 nn. 14, 15 (Bankr. W.D. Mo. 2001).

The court reviewed all the evidence in the record before it.¹ Contrary to the debtors' assertion that it ignored the modification, the court expressly noted that, "[a]t trial, the claimants amended claim 10, modifying the list of property claimed by them." R. 195 at 18. It listed the points of modification identified by the parties. The court then considered in detail each item of equipment raised by the parties at trial. It found that the debtors produced sufficient evidence to defeat the prima facie case with respect to six pieces of equipment. It next reviewed the documentation admitted in evidence that supported the claims on the remaining equipment not raised at trial. With respect to those pieces of equipment, the court found that the debtors, with the burden of coming forward with evidence contradicting the validity or amount of the claim, failed to defeat the claimants' prima facie case with evidence that could overcome the presumed validity of those claims. See R. 195 at 22. The court's present review of the evidence gives it no reason to modify its determination. There was no error in the court's finding that the debtors produced sufficient evidence to defeat the claim with respect to six pieces of equipment but not with respect to the remaining inventory.

Conclusion

Having reviewed the debtors' B.R. 3008 Motion for Reconsideration of Order Allowing and Disallowing Claims, the court now grants the motion in part and denies the motion in part.

¹ The court found that the debtors' discussion of the farm equipment in their briefs was quite cursory. In their Reply Brief, for example, the debtors argued that there was no Kalwitz family farm partnership and that the farm equipment belonged to the debtors because they farmed the property, maintained the equipment, and listed it on the depreciation schedules of their tax returns. In that brief, the only piece of machinery the debtors discussed was the Steiger tractor. At the trial, however, the parties considered specific farm equipment, piece by piece.

The court grants the motion in order to clarify the specific amount allowed in claim 8. It amends its Judgment and Memorandum of Decision to state that “the court allows claim 8 in the amount of one-sixth of the interest in the Weich Farm.”

Concerning the remaining contentions, however, the court finds that the debtors reiterated their previous arguments. They did not present an error of law, an intervening change in the controlling law, or newly discovered evidence. *See Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1121 n.3 (7th Cir. 2001). For those reasons, the court therefore denies the motion in all other respects.

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT